Wong Leh Yin v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-09–154–05 OF 2012
ABDUL WAHAB PATAIL, ZAHARAH IBRAHIM AND MOHAMAD ARIFF JJCA
16 MAY 2013

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Criminal Procedure — Appeal — Petition of appeal — Preliminary objection — Petition of appeal filed in Bahasa Malaysia ('BM') — Whether petition defective — Whether use of BM prohibited — Whether objection purely technicality — Whether non-compliance with rules had occasioned substantial miscarriage of justice — Rules of the High Court 1980 O 2 r 3

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The appellant raised a preliminary objection to the petition of appeal ('the petition') filed by the public prosecutor in the High Court in Sibu on the grounds that the petition, which was written in Bahasa Malaysia ('BM') was defective and ought to be struck out. The preliminary objection was based on art 161(2)(b) of the Federal Constitution and Point 2C of the '20-Point Malaysia Agreement', which provided for the use of the English language in Sarawak for all purposes without limitation of time. When this preliminary objection was dismissed, the appellant proceeded by way of the present appeal. In this appeal, it was the appellant's contention that the petition filed in BM was bad in law and inadmissible. Consequently the appellant argued that there was no valid petition of appeal filed before the High Court within 14 days after the grounds of decision was served upon the public prosecutor.

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Held, dismissing the appeal:

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(1) The document reproduced in the record of appeal as evidencing the '20-Point Malaysia Agreement' was of uncertain origin and could not be accepted as authoritative. Even if accepted, all that was needed was to understand the distinction between 'an official language' and 'the official language'. Hence, the use of BM was not prohibited as it was also an official language (see para 14).

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(2) In the instant case the entire objection was that the petition was filed in BM and not that because of the use of the national language, the appellant had been denied an opportunity to appreciate what the grounds of appeal were and was therefore denied an opportunity to defend himself. The objection was purely a technicality. Order 2 r 3 of the Rules of the High Court 1980, which apply equally to both civil and criminal proceedings, makes it clear that a judge should not allow any preliminary objection by any party only on the ground of

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non-compliance of any of the Rules unless the judge was of the opinion that such non-compliance had occasioned a substantial miscarriage of justice. Since there was no miscarriage of justice in the present case, the appeal was dismissed (see para 21).

[Bahasa Malaysia summary

Perayu membangkitkan bantahan awalan kepada petisyen rayuan ('petisyen') yang difailkan oleh pihak pendakwa raya di Mahkamah Tinggi di Sibu atas alasan bahawa petisyen tersebut, yang ditulis di dalam Bahasa Malaysia ('BM') adalah cacat dan patut dibatalkan. Bantahan awalan adalah berdasarkan perkara 161(2)(b) Perlembagaan Persekutuan dan Poin 2C '20-Point Malaysia Agreement', yang memperuntukkan penggunaan Bahasa Inggeris di Sarawak untuk kesemua tujuan tanpa had masa. Apabila bantahan awalan ini ditolak, perayu meneruskan melalui rayuan ini. Dalam rayuan, ia adalah hujahan perayu bahawa petisyen yang difailkan di dalam BM adalah salah dari segi undang-undang dan tidak boleh diterima. Akhirnya perayu berhujah bahawa tidak terdapat petisyen rayuan yang sah difailkan di hadapan Mahkamah Tinggi dalam masa 14 hari selepas alasan keputusan diserahkan ke atas pendakwa raya.

Diputuskan, menolak rayuan:

(1) Dokumen yang dikemukakan di dalam rekod rayuan sebagai membuktikan '20-Point Malaysia Agreement' adalah daripada punca yang tidak pasti dan tidak boleh diterima sebagai authoritatif. Walaupun jika diterima, apa yang diperlukan adalah untuk memahami perbezaan di antara 'an official language' dan 'the official language'. Maka, penggunaan BM tidak dilarang kerana ia juga adalah bahasa rasmi (lihat perenggan 14).

(2) Dalam kes ini, keseluruhan bantahan adalah bahawa petisyen difailkan dalam BM dan bukan kerana penggunaan bahasa kebangsaan, perayu telah dinafikan peluang untuk membela dirinya. Bantahan adalah semata-mata teknikal. Aturan 2 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980, yang mana akan beraplikasi secara rata kepada kedua-dua prosiding sivil dan jenayah, membuatkan ianya jelas bahawa hakim tidak patut membenarkan apa-apa bantahan awalan oleh mana-mana pihak hanya atas alasan ketidakpatuhan mana-mana Kaedah kecuali hakim berpendapat bahawa ketidakpatuhan sedemikian menyebabkan ketidakadilan. Memandangkan tidak terdapat ketidakadilan dalam kes ini, rayuan ditolak (lihat perenggan 21).]

Notes

For cases on petition of appeal, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue)

Cases referred to

Dato' Mohamed Hashim Shamsuddin v Attorney-General, Hongkong [1986] 2 MLJ 112, SC (refd)

Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad [2010] 2 MLJ 41; [2010] 1 CLJ 444, CA (refd)

Gapari bin Kitingan v Attorney General, Malaysia [1991] 1 MLJ 159, SC (refd)

Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1994] 1 MLJ 592, HC (refd)

Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1994] 2 MLJ 420; [1994] 2 CLJ 729, SC (folld)

Legislation referred to

Courts of Judicature Act 1964 s 3
Criminal Procedure Code s 307(4), (9)
Federal Constitution art 161, 161(2)(b)
National Language Acts 1963/67 ss 1(2), 2
Rules of the Court of Appeal 1994 r 101(2)
Rules of the High Court 1980 O 2 r 3, O 92 r 1, 1(2)

Appeal from: Criminal Appeal No SB-42–7 of 2011 (High Court, Sibu)

Orlando SW Chua (Wong Orlando Chua & Kuok Advocates) for the appellant. (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellant Wong Leh Yin ('the appellant') appealed against the dismissal of his preliminary objection that the petition of appeal of the public prosecutor dated 17 June 2011 was written in Bahasa Malaysia and therefore defective and to be disregarded.

[2] The objection was based on art 161(2)(b) of the Federal Constitution and Point 2C of the 20-Point Malaysia Agreement which provides for the use of the English language in Sarawak.

[3] It was submitted before us that the petition of appeal filed before the High Court in Sibu, not being in the English anguage, was bad in law and inadmissible, with the consequence that there was no valid petition of appeal filed before the High Court within 14 days after the grounds of decision of the Sessions Court, Sibu, was served upon the public prosecutor, contrary to s 307(4) of the Criminal Procedure Code and, under s 307(9) thereof, deemed to have lapsed or been withdrawn.

[4] After hearing the submissions for the parties, we dismissed the appeal. Our reasons are as follows.

[5] Article 161 of the Federal Constitution is in Part XIIA pertaining to Additional Protections for States of Sabah and Sarawak provides:

> (1) No Act of Parliament terminating or restricting the use of the English Language or for any of the purposes mentioned in Clauses (2) to (5) of Article 152 shall come into operations as regards the use of the English Language in any case mentioned in Clause (2) of this Article until ten years after Malaysia Day.
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> (2) Clause (1) applies —
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> (a) to the use of the English Language in either House of Parliament by a member for or from the State of Sabah or Sarawak; and
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> (b) to the use of the English Language for proceedings in the High Court in Sabah and Sarawak or in a subordinate court in the State of Sabah or Sarawak, or for such proceedings in the Federal Court or the Court of Appeal as are mentioned in Clause (4); and
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> (c) to the use of the English Language in the State of Sabah or Sarawak in the Legislative Assembly or for other official purposes (including the official purposes of the Federal Government).

[6] We make three observations.

[7] Firstly, cl (2)(b) is the basis for the instant appeal. For the purpose of clarity, the term proceeding is defined in s 3 of the Courts of Judicature Act 1964as meaning any proceeding whatsoever of a civil or criminal nature and includes an application at any stage of a proceeding.

[8] Secondly, cl (1) makes it abundantly clear that it prohibits any Act of Parliament terminating or restricting the use of the English Language for any of those purposes mentioned in cll (2)–(5).

[9] Thirdly, cl (1) applied for ten years from Malaysia Day.

[10] Hence, the preliminary objection insofar as it is based on art 161 cl (2)(b), is flawed.

[11] Section 2 of the National Language Acts 1963/67 (Revised 1971) ('Act 32') provides that:

> Save as provided in this Act and subject to the safeguards contained in Article 152 (1) of the Constitution relating to any other language and the language of any other community in Malaysia the National Language shall be used for official purposes.

[12] But, since (a) s 1(2) thereof provides that the Act shall come into force in the States of Sabah and Sarawak on such dates as the respective state authorities may by enactments of the legislatures of the respective states appoint and different dates may be appointed for the coming into force of different provisions of the Act in those states, and (b) no such dates has been appointed, it is of no further relevance to the consideration of this appeal.

[13] It was submitted in the High Court that Point 2C of the 20-Point Malaysia Agreement provides that:

> English shall be an official language of Borneo (Sabah & Sarawak) for all purposes, State or Federal, without limitation of time.

[14] The document produced in the bundle of authorities before the High Court, and reproduced at p 66 of the record of appeal *Jilid* 1 before this court, as evidencing the '20-Point Malaysia Agreement' is of uncertain origin. We recall that in the case of the State of Sarawak it was an 18-Point Agreement. Furthermore, the language in the document produced was 'English should be an official language of Borneo (Sarawak & Sabah) for all purposes, State or Federal, without limitation of time'. How the words of persuasion 'should be' transformed into the imperative 'shall be' in bold letters at para [7] of the submissions before the High Court is unexplained.

[15] Clearly, the document produced cannot be accepted as authoritative and the submission devoid of merit. Even if accepted as such, all that is needed is to understand the distinction between 'an official language' and 'the official language', in which case the use of Bahasa Malaysia is not prohibited, and it is an official language also.

[16] We considered the submission based on O 92 r 1(2) of the Rules of the High Court 1980 where it is provided:

> For Sabah and Sarawak, any document required for use in pursuance of these rules shall be in the English Language and may be accompanied by a translation thereof in the National Language except that the translation for the purpose of Order 1, rule 6(4) and rule 7(1) must be prepared in accordance with rule 6(5) of that Order:
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> Provided that any document in the National Language may be used as an exhibit, with or without a translation thereof in the English Language.

[17] Reference was also made to r 101(2) of the Rules of the Court of Appeal 1994 which is in similar language.

[18] The appellant relied upon the Supreme Court decision in *Sykt Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1994] 2 MLJ 420; [1994]

2 CLJ 729 (SC) that O 92 r 1 of the RHC 1980 is a mandatory provision which requires that any document which is not in the National language or in the English language must be translated into the national language before it can be admitted as an exhibit:

> In this case the book 'Malaysian Business Chinese Directory' is in Chinese writing. Witnesses told the court that it contains a list of businesses and trade names together with their telephone numbers. The learned judge hearing the case cannot rely on the oral evidence of witnesses alone as to what the contents of the book are. It is the primary function and duty of the learned Judge to look at the book, to satisfy himself what it is, and decide, if necessary with the help of experts in the Chinese language and writing, whether the book is in fact a telephone directory as defined by the law. In this case it is impossible for the learned judge, by looking at the book, to come to any decision simply because he himself is unable to understand what it is.
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> We find that O 92 r 1 of the Rules of the High Court 1980, is a mandatory provision which requires that any document which is not in the National Language or in the English Language must be translated into the National Language before it can be admitted as an exhibit. Further, it has been held by the courts that Rules of Court are to be obeyed. Failure to comply with them will lead to chaos in the conduct of litigation. See *Lee Guat Eng v Tan Lian Kim* [1985] 2 MLJ 196, *Ratnam v Cumarasamy & Anor* [1962] 1 LNS 146.
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> It is regretted that the well-founded submission of learned counsel for the respondent went unheeded in the court below. Secondary ie oral evidence of the witnesses about the contents of exh P7, a document (a book) in Chinese, should not have been considered by the court below as such evidence would become relevant normally only on the non-availability of exh P7 as when such non-availability is accounted for in some way. Here exh P7 was available and the appellant in fact submitted it in evidence without a certified translation of the same in the National Language in contravention of O 92 r 1 of the Rules of the High Court. The High Court should not have admitted it as an exhibit. Without this book, there is no evidence to substantiate the appellant's claim, and for this reason the appellant's claim must, therefore, fail. We, therefore, dismissed the appeal with costs.

[19] The above, in our view, demonstrates the application of O 92 r 1 of the RHC. The document rendered inadmissible was evidence that was not in either English or Malay. The third last paragraph suggests that had the said document been translated into English, it would not have been rejected.

[20] The Court of Appeal decision in *Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2010] 2 MLJ 41; [2010] 1 CLJ 444 (CA) was also cited. We note the discretion was exercised to deliver the judgment in English. Despite the firmness in which it was expressed, the decision was not based solely on absence of a memorandum of appeal in the national language, but also upon failure to file a chronology of events, a proper index to Part 'C, and

although notice had been given from 20 August 2007 and 22 August 2007 of the proposed actions that would be sought if the exhibits were not included into the records, it had been ignored.

[21] We observe that in the instant case, the entire objection is that the petition of appeal was filed in the High Court in Bahasa Malaysia, and on that ground, sought to have it struck out. It was not the objection that because of the use of the national language, the appellant had been denied an opportunity to appreciate what the grounds of appeal were and was therefore denied an opportunity to defend himself. The objection was purely a technicality, when it is now trite that the Rules of the High Court 1980 are operative and apply equally to both civil and criminal proceedings. See *Dato' Mohamed Hashim Shamsuddin v Attorney-General, Hongkong* [1986] 2 MLJ 112; *Gapari bin Kitingan v Attorney General, Malaysia* [1991] 1 MLJ 159; *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1994] 1 MLJ 592. Order 2 r 3 makes it clear that a court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of the rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice. It reflects the view that laws, both statute and case law, as well as rules of procedure, ought ordinarily be read liberally or permissively to facilitate justice, and not be so read as to handicap it. Since there was no miscarriage of justice demonstrated in this case, we dismissed the appeal.

Appeal dismissed.

Reported by Kohila Nesan